No. 14647

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

On Appeal From the Judgments of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

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BRIEF FOR THE APPELLANTS.

Opinion Below.

The District Court's findings of fact and conclusions of law [R. 31-37, 39-44] are not reported.

Jurisdiction.

This appeal involves federal social security taxes. The taxes in dispute were paid as follows: $17,013.04 on December 15, 1948 [R. 4]; $8,796.64 on July 12, 1950 [R. 19]. Claims for refunds were filed on April 21, 1949 [R. 4], and July 31, 1950 [R. 19], respectively, and were rejected by notices dated October 20, 1949 [R. 13-15], and October 27, 1950 [R. 24-26], respectively.

Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on July 7, 1950 [R. 15], and October 20, 1952 [R. 26], the taxpayer brought actions in the District Court for recovery of the taxes paid. These two causes were consolidated for all purposes pursuant to the minute order of the District Court dated June 29, 1954. [R. 30-31.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. Judgments were entered on July 14, 1954. [R. 37-38, 45-46.] Within 60 days and on August 26, 1954, notices of appeal were filed. [R. 47-48.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the dealers and route district men engaged in the distribution of taxpayer's newspapers are employees within the meaning of Section 1607 of the Internal Revenue Code of 1939.

Statute and Regulations Involved.

The applicable portions of the relevant statute and Regulations are set forth in the Appendix, *infra.*

Statement.

The Collectors contend that the District Court failed to find sufficient material primary facts upon which to support its ultimate findings and that its ultimate findings are clearly erroneous as not supported by the weight of undisputed evidence and for the reasons hereinafter stated in the argument.

So far as is pertinent to the issues here involved, the District Court merely found as primary facts that [R. 34-35] in the years 1943 and 1944 the taxpayer was in

he business of publishing a daily newspaper, the Daily News, at Los Angeles, California; that the taxpayer, as ublisher and distributor of the Daily News, sold newsapers to certain route district men and dealers (hereinfter called wholesalers or route men) at a "wholesale" rice and was paid therefor by the wholesalers; and that he wholesalers resold or offered for resale the newspapers o purchased by them and retained any excess over the ost of the newspapers. The District Court then found s ultimate fact and concluded as a matter of law [R. 6] that the wholesalers were not employees of the taxayer and that their earnings were, therefore, nontaxable nder the Federal Unemployment Tax Act.

The additional material primary facts not found by the District Court but supported by undisputed record evidence [R. 51-134], establishing as clearly erroneous the District Court's ultimate finding and conclusion of law that the elationship between taxpayer and its wholesalers was that f seller and purchaser or independent contractor, rather han employer and employee, are as follows:

Distribution of the taxpayer's newspapers was made hrough its circulation department made up of office, supervisory and transportation employees, three intermediary listribution groups designated as street district men, route listrict men and dealers and, finally, street vendors and ome-delivery carrier boys. [R. 54, 65, 67-68, 94; Deft. Ex. A,[1] pp. 4, 12, 19-20.] The status of the route district

[1]All of the exhibits introduced and admitted at the trial were esignated by the appellants for printing as part of the record on ppeal. However, they were not included by the Clerk of this Court with the other portions of the record for printing. Instead, ppellants were furnished with the original exhibits for reference n the preparation of their brief. All references are to those original xhibits, which have been returned to the Clerk.

men and dealers is here in dispute. During the period here involved taxpayer and its route men were governed in their relationship by contract with the Los Angeles Newspaper Guild, the authorized representative of the organized route men. [R. 71, 84; Deft. Exs. A, B, C.]

The street district men are salaried workers who distribute newspapers to newsboys and newsstands for sidewalk sales in the city. These distributors are conceded to be employees and taxpayer has always reported their earnings in its employment tax returns.[2] The route district men handle subscription home delivery distribution in the city area and the dealers handle either home delivery or single copy sales distribution or both in suburban areas. [R. 67-68.] All individuals engaged as route district men and dealers were over 18 years of age. They were engaged pursuant to job application and interview [R. 107-108] and were under the continuing authority of supervisors who in turn were subordinate to a circulation manager. [R. 90-91, 94.]

The route man's job was to maintain regular and competent delivery service to taxpayer's subscribers and strive to maintain maximum circulation of taxpayer's newspapers in keeping with taxpayer's policies. [Pltf. Ex. 1, Sec. 1, par. 1.] In this regard, he had to be available when the papers were spotted by the publisher's trucks (dropped-off at prearranged points in the route man's distribution area), pick them up and get them out to the Daily News readers (usually with the help of carrier boys), see that

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[2]The Internal Revenue Service letter of October 16, 1947 [R. 14], which served as the basis for taxpayer's complaint [R. 3-15], is unchallenged so far as these primary facts are concerned. At any rate, they merely serve as background material to the question now before this Court.

the money was collected and payment made to the publisher monthly for the full allotment of papers. [R. 106.] Taxpayer furnished the route men with lists of subscribers and their addresses, or locations of single copy sales points, which were not to be revealed to any person other than a duly accredited representative of taxpayer and were to be returned with any additions made by the route men upon request. [Pltf. Ex. 1, Sec. 1, par. 7.]

Taxpayer fixed the wholesale and retail prices of its papers. [Pltf. Ex. 1, Sec. 1, par. 2; Sec. 3, par. 1.] The distribution area where the route man would have to work and the physical or geographical limits of that area were also fixed and determined by taxpayer. [Pltf. Ex. 1, Sec. 1, par. 8.] It could not be expanded or contracted by the route man but could be revised by taxpayer against his wishes. [R. 87.] He could not work for a competitive publisher and do the same work. [R. 92; Deft. Exs. A, B, Sec. 13; C, Sec. 8.] He could be fired without notice [Pltf. Ex. 1, Sec. 4] or, if dissatisfied, could quit. [R. 90, 123; Pltf. Ex. 1, Sec. 5.] He had to work a minimum number of hours so divided as to meet the requirements of his duties (except suburban dealers) [R. 92; Deft. Exs. A, B, C, Sec. 3], was guaranteed a minimum amount of net earnings per week for his services [R. 90; Deft. Exs. A, Sec. 26; B, Sec. 25; C, Sec. 22], a vacation with pay [R. 91; Deft. Exs. A, B, Sec. 7; C, Sec. 6], sick leave with pay [Deft. Exs. A, B, Sec. 6; C, Sec. 5], and was covered by workmen's compensation insurance [R. 73] and a collective bargaining agreement. [R. 85; Deft. Exs. A, B, C.] He was prohibited from entering into agreements with advertisers for the insertion into or stamping onto taxpayer's newspapers of any advertising material. [Pltf. Ex. 1, Sec. 2, par. 1.] Nor could he

assign or transfer his job or any interest therein. [Pltf. Ex. 1, Sec. 2, par. 2.] Although he used his own car, the minimum guaranty of net earnings per week was computed by deducting automobile allowances and other authorized expenses from the net difference that he retained between the price he was charged and in turn charged the carrier boys for the papers allotted. [Deft. Exs. A, Sec. 26; B, Sec. 25; C, Sec. 22.] And there was provision made for the crediting of unsold newspapers. [Pltf. Ex. 1, Sec. 1, par. 4.]

Taxpayer maintained a general office which the route men used rent-free for their paper work, etc. [R. 88, 119.] Taxpayer's supervisors carried on a continuing promotional program with the route men. Meetings were held in which distribution techniques were discussed and criticized, material distributed and suggestions made. [R. 82-83, 122.] These were followed since it was in the route man's best interest to do so. [R. 106-107.]

Upon the basis of the total factual complex disclosed by the record, the Collectors have appealed the decision of the court below.

Statement of Points to Be Urged.

1. The District Court erred in that the evidence does not support the ultimate findings of fact.

2. The District Court erred in that the judgment is not supported by any substantial evidence.

3. The District Court erred in finding and concluding that the individuals concerned were independent contractors and not employees of the taxpayer.

4. The District Court erred in not finding and concluding that the individuals concerned were engaged as a

means of livelihood in regularly performing personal services which (1) constituted an integral part of taxpayer's business operation; (2) were not incidental to the pursuit of a separately established trade or business—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) were subject to a reasonable measure of general control over the manner and means of their performance.

Summary of Argument.

The court below failed to find sufficient material primary facts upon which to base its ultimate findings and conclusions. And these ultimate findings and conclusions are clearly erroneous as not supported by the weight of undisputed evidence. The totality of material primary facts amply demonstrates that the dealers and route district men were employees within the meaning of Section 1607 of the Internal Revenue Code of 1939. That is, according to traditional common law notions realistically applied, they are well within the class of working people intended by Congress to receive the benefits and protection of its social security program against the hazards of modern business competition unless expressly excepted. No such exception applies in this case.

As a question of fact, not only did taxpayer control the mechanics of its distribution operation, but it also exercised a very powerful economic control over the dealers and route district men engaged therein. Taxpayer fixed the location and size of the territory to be handled. It fixed the wholesale and retail prices of its newspapers. It forbade similar employment on the part of its dealers and route district men for a competitive newspaper. It

forbade any independent arrangements between its route district men and dealers and advertisers for the insertion of advertising matter. And it controlled the subscription lists. The services performed by the workers involved constituted an integral part of taxpayer's business and were not incidental to the pursuit of a separately established trade or business. When the workers' relationship with the taxpayer ceased they were out of a job, like any employee. And this situation dramatically occurred just before Christmas of 1954 when taxpayer stopped its presses and was later declared a bankrupt. Nor was there any opportunity for profit or loss based upon any capital investment in the light in which those factors have been considered by the Supreme Court as tending to establish an independent contractor status. The only real investment was made by the taxpayer and, although some of the dealers and route district men used their own cars, they were guaranteed a net remuneration per week which was computed by deducting from gross earnings automobile and other authorized expenses. And provision was made for the return of unsold papers. Finally, the relationship was a potentially permanent one, unlike that with an independent contractor which normally expires at the end of a particular job or result.

As a question of law, this case should be controlled in principle, within the general framework set down by the Supreme Court and Congress, by the well-reasoned opinion in *Hearst Publications v. United States,* 70 Fed. Supp. 666 (N. D. Cal.), affirmed *per curiam,* 168 F. 2d 751 (C. A. 9th), and two others decided the same day. It should be left to Congress to add to the express exceptions from coverage within its social security program.

ARGUMENT.

The Workers Involved Were Employees for Social Security Purposes Within Traditional Common Law Notions and as a Matter of Economic Reality.

A. The Statute.

The Social Security Act[3] was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly unemployment and old age. It was enacted in an effort to coordinate the forces of government and industry for solving these problems.[4] The principal method adopted by Congress to advance its purposes was to provide for periodic payments in the nature of annuities to the elderly and compensation to workers during periods of unemployment. We are here concerned with the Federal Unemployment Tax Act, which is Subchapter C of the Internal Revenue Code of 1939. Employment taxes, such as we are here considering, are necessary to produce the revenue for federal participation in the program of alleviation.

Employers do not pay taxes on certain specifically exempt groups of employees. Internal Revenue Code of

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[3]Social Security Act. C. 531, 49 Stat. 620.

[4]Message of the President, January 17, 1935, and Report of the Committee on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess.; S. Rep. No. 628, 74th Cong., 1st Sess. (1939—2 Cum. Bull. 611); S. Rep. No. 734, 76th Cong., 1st Sess. (1939—2 Cum. Bull. 565); H. Rep. No. 615, 74th Cong., 1st Sess. (1939—2 Cum. Bull. 600); H. Rep. No. 728, 76th Cong., 1st Sess. (1939—2 Cum. Bull. 538); *Steward Machine Co. v. Davis,* 301 U. S. 548; *Helvering v. Davis,* 301 U. S. 619.

1939, Sec. 1607(c) (Appendix, *infra.*) So far as may here be relevant, only the service performed by an individual *under the age of 18* in the delivery of newspapers, but *not including delivery or distribution to any point for subsequent delivery or distribution;* and the service performed by an individual *in and at the time of the sale of newspapers to ultimate consumers* have been excepted. 1939 Code, Sec. 1607(c)(15)(A) and (B). Taxes are laid as excises on a percentage of the wages paid the nonexempt employees. 1939 Code, Sec. 1600 (Appendix, *infra*). "Wages" means all remuneration for the employment that is covered by the Act. 1939 Code Sec. 1607(b) (Appendix, *infra*). "Employment" means "any service performed * * * by an employee for the person employing him" with certain express exceptions. 1939 Code Sec. 1607(c). "Employee" does not include any individual who under normal common law rules has the status of an independent contractor or who would not be an employee under such rules. 1939 Code Sec. 1607(i) (Appendix, *infra*).

B. Application of the Statute to the Facts of This Case.

The question presented is whether the relationship between taxpayer and its so-called dealers and route district men was that of employer and employee for purposes of the Federal Unemployment Tax Act or, stated another way, whether the status of the workers involved was such as to come within the intended coverage of that Act. Nearly a decade ago, when the Supreme Court first con-

sidered the social security program[5] and established the fundamental precepts by which such legislation is still to be construed and applied (S. Rep. No. 1255, 80th Cong., 2d Sess., p. 7), Mr. Justice Reed, delivering the opinion of that Court in *United States v. Silk,* 331 U. S. 704, said *inter alia* (pp. 711-712):

> The very specificity of the exemptions * * * and the generality of the employment definitions indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would * * * invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

In the intervening years prior to this decision of the Supreme Court a lack of uniformity had developed in Federal District and Circuit Court decisions construing the

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[5]To set forth its views and reconcile developing conflicts in the lower courts, the Supreme Court issued writs of certiorari to the Tenth Circuit in *United States v. Silk* (with which was joined *Harrison v. Greyvan Lines, Inc.,* on certiorari to the Seventh Circuit), 331 U. S. 704 (decided June 16, 1947), and *Bartels v. Birmingham,* 332 U. S. 126 (decided a week later). The same problem (arising under the Fair Labor Standards Act) was involved in *Rutherford Food Corp. v. McComb,* 331 U. S. 722, on certiorari to the Tenth Circuit (decided the same day as the *Silk* case.). These together with *Labor Board v. Hearst Publications,* 322 U. S. 111 (dealing with this problem under the National Labor Relations Act), are the leading cases treating with the concept of employment within the purview of federal remedial legislation.

term "employee." The general tendency among the lower federal courts, when presented with the problem of determining the existence of an employer-employee relationship, was to adopt the precedents of local law. These varying among the different states, considerable conflict in lower court decisions followed even though the factual situations were not unlike. Moreover when the cases presented were on a claim for benefits, the courts tended to a liberal construction. On the other hand, when the cases were on an assessment of taxes, particularly when penalties were involved, the courts tended to construe the term more strictly. To resolve the conflict, the Supreme Court assumed jurisdiction of *United States v. Silk,* 331 U. S. 704; *Harrison v. Greyvan Lines, Inc.,* 331 U. S. 704; and *Bartels v. Birmingham,* 332 U. S. 126. Its decision affirmed that the usual common-law rules, *realistically applied,* must be used to determine whether a person is an "employee."

The usual common-law rule defining an "employee" is well stated in the Treasury's regulation,[6] *inter alia,* as follows:

> Generally such relationship exists where the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. * * * In

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[6]Sec. 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act (Appendix, *infra*).

> this connection, *it is not necessary that the employer actually direct or control the manner in which the services are performed*; it is sufficient if he has the right to do so. * * * (Italics supplied.)

It has been accepted as an authoritative definition of the distinction between an "employee" and an "independent contractor." *Radio City Music Hall Corp. v. United States,* 135 F. 2d 715, 717 (C. A. 2d); also see S. Rep. No. 1255, *supra,* p. 4. To have a *realistic* application of this rule in construing federal social security legislation the Supreme Court would include within the definition of "employee" workers who were such as a matter of economic reality. See *Labor Board v. Hearst Publications,* 322 U. S. 111; *Rutherford Food Corp. v. McComb,* 331 U. S. 722; *Helvering v. Davis,* 301 U. S. 619, 641. And in measuring a worker's dependent economic status degrees of control, opportunities for profit or loss, investment in facilities, permanency of the relation, special skill or preparatory training required are suggested as material factors. *United States v. Silk, supra,* p. 716; see also *Schwing v. United States,* 165 F. 2d 518 (C. A. 3d); *Fahs v. Tree-Gold Co-op. Growers of Florida,* 166 F. 2d 40, 45 (C. A. 5th). But the *caveat* immediately follows that no one factor is to be controlling nor is the list complete.

The material factors applied to the totality of established facts in this case compel the conclusion that the dealers and route district men were employees.

1. The Control Factor.

The common-law test of the employment relationship contemplated only a "reasonable measure of direction and control" which "need not relate to every detail"[7] (*Jones v. Goodson,* 121 F. 2d 176, 180 (C. A. 10th)), but is to be determined by the nature of the work and the experience of the employee.[8] Immediately, the fact that the dealers' and route men's maximum earnings depended on the amount of their sales would tend to obviate any instruction to increase sales. Anyone operating on a piece-meal or commission basis is moved by self-interest to increase his production or sales. See, *e. g., United States v. Silk,*

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[7]The rule of "complete control" announced in *Bohanon v. James McClatchy Pub. Co.,* 16 Cal. App. 2d 188, 60 P. 2d 510, has not been followed even in California, in defining the employment in remedial legislation. *Twentieth Etc. Lites v. Cal. Dept. Emp.,* 28 Cal. 2d 56, 168 P. 2d 699; *Grace v. Magruder,* 148 F. 2d 679 (C. A., D. C.). In any event, federal courts are not bound by state court decisions in their interpretation of national social security legislation. *Labor Board v. Hearst Publications, supra;* also see *Hearst Publications v. United States,* 70 Fed. Supp. 666, 672 (N. D. Cal.), affirmed *per curiam,* 168 F. 2d 751 (C. A. 9th). *A fortiori,* the decision of a state or local administrative board regarding the state's own social security program [Pltf. Ex. 2] is distinctly inconclusive, irrelevant and immaterial. *Matcovich v. Anglim,* 134 F. 2d 834, 836-837 (C. A. 9th), certiorari denied, 320 U. S. 744. For these reasons it was prejudicial error for the trial court to admit Plaintiff's Exhibit 2 in evidence as well as any testimony in relation thereto. [R. 55, 74-79.] See *Matcovich v. Nickell,* 134 F. 2d 837 (C. A. 9th), and *Matcovich v. Anglim, supra.*

[8]*Walling v. American Needlecrafts,* 139 F. 2d 16 (C. A. 6th); *Western Express Co. v. Smeltzer,* 88 F. 2d 94 (C. A. 6th); *Peasley v. Murphy,* 381 Ill. 187, 44 N. E. 2d 876; *Andrews v. Commodore Knitting Mills,* 257 App. Div. 515, 13 N. Y. S. 2d 577. "The nature of the employee's work may be such that much or little supervision may be necessary." *Fisher v. Industrial Commission,* 301 Ill. 621, 629, 134 N. E. 114, 117. See also *Western Express Co. v. Smeltzer, supra; Franklin Coal Co. v. Industrial Commission,* 296 Ill. 329, 129 N. E. 811; *Eagle v. Industrial Comm.,* 221 Wis. 166, 266 N. W. 274.

supra; Fahs v. Tree-Gold Co-op. Growers of Florida, supra; Schwing v. United States, supra; Tapager v. Birmingham, 75 Fed. Supp. 375 (Iowa); and *Atlantic Coast Life Ins. Co. v. United States,* 76 Fed. Supp. 627 (E. D., S. C.). But, nevertheless, taxpayer's supervisors conducted a continuing sales promotional program with these workers, holding meetings, distributing materials to stimulate circulation, criticizing distribution techniques and encouraging better work. [R. 82-83, 122; Pltf. Ex. 1, Sec. 1, par. 1.] The supervisors were in turn responsible to the circulation managers. [R. 90-91, 94.]

The dealers and route men were supplied with lists of subscribers and single copy sales locations which remained the property of the taxpayer, as revised by the dealers and route men, and could not be shown to unauthorized parties. [Pltf. Ex. 1, Sec. 1, par. 7.] They had to work a minimum number of hours, so divided to meet their particular situations. [R. 92; Deft. Exs. A, B. C, Sec. 3.] Clearly they were not engaged to obtain any particular independent result but to perform a continuing supervised integrated service for the taxpayer. They were, indeed, fortunate that the supervisors' policy was to suggest and not order, but that does not make the taxpayer's actual and potential control over how the work was to be done any less real or reasonable.

Besides this control over the mechanics of the integrated distribution operation with which we are concerned, taxpayer exercised a very powerful economic control over its dealers and route men. To begin with, the dealers and route men could not do the same work for any competitive publisher. [R. 92; Deft. Exs. A, B, Sec. 13; C. Sec. 8.] Secondly, taxpayer fixed the geographical

limits of each dealer's or route man's territory and could reduce or change them at will. [R. 87; Pltf. Ex. 1, Sec. 1, par. 8.] Thirdly, they fixed the retail rate at which the papers could be sold to the subscriber or single copy purchaser. [Pltf. Ex. 1, Sec. 1, par. 2.] This effectively limited the price at which the dealers and route men could charge out their papers to the carrier boys. And there is strong evidence that the taxpayer even fixed the so-called "wholesale" prices. Beyond the express language to that effect in the individual work contracts [Pltf. Ex. 1, Sec. 1, par. 2, Sec. 3, par. 1] the negotiations between the dealers and route men and the carrier boys was always subject to the review of the supervisors and were often effected in accordance with their suggestions. [R. 70, 89.] It is apparent that the taxpayers, like the publishers in *Labor Board v. Hearst Publications,* 322 U. S. 111, 117-118, "in a variety of ways prescribe[d], if not the minutiae of daily activities, at least the broad terms and conditions of work." See *United States v. Vogue, Inc.,* 145 F. 2d 609 (C. A. 4th).

Certainly the control here present cannot be likened to that in *Henry Broderick, Inc. v. Squire,* 163 F. 2d 980 (C. A. 9th); *Haley v. United States* (N. D., Ind.), decided February 12, 1944; *Cannon Valley Milling Co. v. United States,* 59 Fed. Supp. 785 (Minn.); *Spirella Co. v. McGowan,* 52 Fed. Supp. 302 (W. D., N. Y.), and similar cases, where the individuals concerned were free to do and go as they pleased. The existence of at least designated sales territories, minimum sales quotas and number of working hours, and attendance at sales meetings, however—all present in this case—would, in those cases, have satisfied an ultimate finding or conclusion that

certain individuals were employees. *Rambin v. Ewing,* 106 Fed. Supp. 268 (W. D., La.); *Sterns v. Clauson,* 122 Fed. Supp. 795 (Me.); *Levin v. Manning,* 124 Fed. Supp. 192 (N. J.). Here the dealers and route men formed an integral part of the whole operation of taxpayer's business and there was little they could do to shape policy or carry on their activities independently of or in opposition to the taxpayer. *Cf., Beckwith v. United States,* 67 Fed. Supp. 902 (Mass.); *Bedford Pulp & Paper Co. v. Early* (E. D., Va.), decided April 6, 1944; *Tapager v. Birmingham, supra; Pure Baking Co. v. Early* (E. D., Va.), decided May 7, 1943; *Stone v. United States,* 55 Fed. Supp. 230 (E. D., Pa.), where an employee-employer relationship was determined. In fact, the control thus exercised is far greater than that which has regularly been sufficient to establish the existence of an employer-employee relationship. See: *Bartels v. Birmingham,* 332 U. S. 126; *Rutherford Food Corp. v. McComb,* 331 U. S. 722; *United States v. Wholesale Oil Co.,* 154 F. 2d 745, 748-749 (C. A. 10th); *Matcovich v. Anglim,* 134 F. 2d 834 (C. A. 9th), certiorari denied, 320 U. S. 744; *Matcovich v. Nickell,* 134 F. 2d 837 (C. A. 9th).

The fact that the dealers and route men enlisted the services of carrier boys on their own behalf does not detract from the control exercised by the taxpayer or characterize them as independent contractors. *Tomlin v. United States,* 70 Fed. Supp. 677 (N. D., Cal.); *Stewart-Jordan Distributing Co. v. Tobin,* 210 F. 2d 427 (C. A. 5th). The right to control and the exercise of control presupposes there is some choice or discretion in the method and means of performing the service involved, whereas, being a carrier boy is not a skilled occupation and home delivery of newspapers is simple and standardized. Again,

they too were motivated by the common incentive. Thus, the absence of direct control over the carrier boys is not a significant factor. *United States v. Vogue, Inc., supra; Hearst Publications v. United States,* 70 Fed. Supp. 666 (N. D., Cal.), affirmed *per curiam,* 168 F. 2d 751 (C. A. 9th). What is significant, however, is the fact that the carrier boys and their parents resorted to the authority of the taxpayer and its supervisors in rectifying their arrangements with the dealers and route men. [R. 70, 89.]

2. The Integration Factor.

Taxpayer's business is, manifestly, the gathering of news and its dissemination to the public while it is still "news." It is not in the business of selling printed newspapers at wholesale to dealers and route district men, amongst others. *Hearst Publications v. United States, supra.* Paid circulation is the life-blood of any newspaper. Its advertising income depends upon it. Hence, taxpayer's circulation department—with its promotional schemes and the supervision of distribution down to the ultimate consumer—is, by the very nature of taxpayer's business, an integrated and key part of the enterprise and those performing the different services must be deemed its employees. Conversely, it cannot be said that the dealers and route men have an independent calling or business of their own which is integrated with the taxpayer's business. This appears from a number of factors. They cannot perform similar services for competing newspapers. They do not hold themselves out to the public as doing business in their own name. [Deft. Ex. B, Sec. 20, par. 2.] The only name associated with the sale of newspapers is the name of the newspaper being sold, which appears on the newspaper and the taxpayer's racks

which hold the papers. In fact, where the papers are delivered by carrier boys, the readers may not even know the route man or dealer. Advertising is done by the taxpayer. [Pltf. Ex. 1, Sec. 1, par. 1.] Promotional materials are supplied by the taxpayer. Continuing supervision is exercised by the taxpayer. The size and location of distribution areas are determined by the taxpayer. The dealers and route men could not contract independently for additional advertisements in their allotment of papers [Pltf. Ex. 1, Sec. 2, par. 1], nor can they assign their "business" or any interest therein. [Pltf. Ex. 1, Sec. 2, par. 2.] The furnishing of office facilities in taxpayer's building [R. 88, 119], is yet further evidence of the employee's status. *Capital Life & Health Ins. Co. v. Bowers,* 186 F. 2d 943 (C. A. 4th).

The crucial and incontrovertible fact regarding integration of the processes intermediary to ultimate public sale of taxpayer's newspaper is that taxpayer at all times recognized itself as bearing the economic consequences of circulation—good or bad. This is made plain by the express provisions throughout the agreement with its dealers. [Pltf. Ex. 1.] The very first covenant extracted from the dealer is that he will use his earnest and conscientious efforts to promote the circulation of taxpayer's newspaper. This was to be done by frequent distribution and display of such advertising matter as taxpayer would supply. If taxpayer was in the business of selling a publication at wholesale, it would fall on the dealer to stimulate his own retail distribution and taxpayer would engage persons in the general business of distributing publications. This is distinctly not a characteristic of the newspaper business. It is crucial to the success of this business that the publisher have a tight control over the

entire operation from the moment the news is received to the moment it hits the streets in printed form. The recent "Yalta papers" disclosure points this up sharply.

Closely connected with this insistence on supervised circulation promotional campaigns are the provisions for retaining all subscriber lists, etc., as the exclusive property of the newspaper and the prohibition against the dealers entering into arrangements with advertisers whereby advertisements of their products would be stamped on or inserted into taxpayer's newspapers. If this were a simple arrangement of purchase and sale of a commodity, apparently title should rest in the purchaser upon delivery. He should then be able to deal with his property as he pleases and put it to the most profitable use. The unavoidable truth of the instant matter is thereby brought sharply into focus. The commodity dealt in by the taxpayer is world, national and local news for the enlightenment of the public, put into printed form as a convenience in circulation. It is not in the wholesale publishing business. And, of course, the mere fact that the dealers are declared in the individual contract to be engaged in an independent business is immaterial. *Griffiths v. Commissioner,* 308 U. S. 355, 358; *United States v. Silk,* 331 U. S. 704; *Bartels v. Birmingham,* 332 U. S. 126; *Matcovich v. Anglim, supra; Williams v. United States,* 126 F. 2d 129 (C. A. 7th). The courts have uniformly been quick to prevent seemingly calculated attempts to escape liability under the federal remedial statutes. *Rutherford Food Corp. v. McComb,* 331 U. S. 722; *Tobin v. Anthony-Williams Mfg. Co.,* 196 F. 2d 547 (C. A. 8th); *McComb v. Homeworkers' Handicraft Cooperative,* 176 F. 2d 633 (C. A. 4th); *Fahs v. Tree-Gold Co-op. Growers of Florida,* 166 F. 2d 40 (C. A. 5th); *Western Union*

Tel. Co. v. McComb, 165 F. 2d 65 (C. A. 6th); *King v. Southwestern Greyhound Lines,* 169 F. 2d 497 (C. A. 10th). As this Court has said, "legal relationships are determined not by labels but by contractual provisions, interpreted according to law." *Childers v. Commissioner,* 80 F. 2d 27, 31 (C. A. 9th); see also *Watson v. Commissioner,* 62 F. 2d 35, 36 (C. A. 9th).

From the foregoing it is plain that the dealers and route men, in so far as both price and distribution policies are concerned, are not at all in the position of independent merchants, who purchase goods from whom they please, under such terms and conditions as they choose and dispose of their products at such time and place and price as they can best determine. Another excellent indication of the extent of the integration and the fact that the route men and dealers are engaged in taxpayer's business is that taxpayer finds it necessary to use them in areas where it knows it will be necessary to pay them something to permit their earning the minimum guaranteed by the collectively bargaining employment contracts. [R. 123.] These facts clearly meet any possible test of integration for purposes of determining the existence of an employer-employee relationship under the Federal Unemployment Tax Act as that factor has been weighed by the courts. See, *e. g., Rutherford Food Corp. v. McComb, supra; Fahs v. Tree-Gold Co-op. Growers of Florida, supra.*

It is also important to note, both from the standpoint of control and integration, that the taxpayer retained a string by which to pull back and revoke the entire agreement with any dealer. [Pltf. Ex. 1, Secs. 4, 5.] Nor did any dealers or route men have the right or power to

assign their "business" or any rights or interest therein. From the standpoint of economic reality, when their relationship with the taxpayer was terminated, they lost their source of income and, in short, were "out of a job" like any employee. [R. 123.] This is precisely the hazard status intended to be covered by the Federal Unemployment Tax Act. *United States v. Silk, supra; Fahs v. Tree-Gold Co-op. Growers of Florida, supra.*[9] Moreover, no form of agreement between taxpayer and the route district men was introduced. They would appear to be subject to even greater control. The obvious purpose of such agreements, as in the case of the dealers, would simply be to provide for the effective and ultimate sale of newspapers to the public, which was the taxpayer's business.

Finally, the collective agreements governing the relationship of taxpayer and the dealers and route men [Deft. Exs. A, B, C] establish even more conclusively that the latter performed an integrated operation in taxpayer's business and were subject to such control as to be deemed its employees. It would be sufficient to refer to the provisions for vacations with pay, overtime compensation, sick leave with pay and severance pay, alone, to support this contention. But, in addition, there are provisions concerning mealtimes, advancement opportunities and "outside" activity. We have earlier made reference to the fixed work week so divided as to meet duty requirements and the guarantee of a weekly minimum remuneration. It is entirely unlikely that one dealing with an independent contractor would assume such obligation. It would be totally

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[9]The discussion under subheading B(4) of the Argument, below, shows how dramatically this state of affairs has recently arisen to support the Collectors' contentions.

nnecessary for him to accept such conditions in an arm's-ength bargain with those engaged in their own business. 'hese facts should not have been virtually ignored by the ɔurt below.[10]

3. Investment in Facilities; Opportunities for Profit and Loss.

Clearly there was no opportunity for profit or loss based pon any capital investment in the light in which those actors were considered by the Supreme Court in the *Silk* ase. To begin with there was virtually no capital invest-ıent whatever. The subscription lists remained the prop-rty of the taxpayer. Although the dealers and route men sed their own cars, if necessary, their net earnings for urposes of the guaranteed minimum weekly remuneration re computed by deducting from gross earnings automo-ile expenses at a fixed rate per mile or lump-sum *mini-ıum* per week. [Deft. Exs. A, Sec. 26; B, Sec. 25; C, ec. 22.] And in no event would the mere fact that the ealers and route men used their own cars be determina-ve of their status as independent contractors. *Perkins ros. Co. v. Commissioner,* 78 F. 2d 152 (C. A. 8th). No ɔecial skill or preparatory training was required of them nd any exercise of business judgment was done by or nder the direction of the supervisors or auditors. By ɔntrast, the real and substantial, if not entire, investment

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[10]A clear indication of the District Court's failure to adequately eigh all of the separate and material factors is in the presiding ıdge's characterization of the status of the workers involved as ·ing akin to a Cadillac automobile dealership franchise [R. 132] · grocery store owner selling nationally advertised beer [R. 133], hich characterization seems to be patently notional and must have ·ecluded any thorough consideration of the entire factual complex ·culiar to the operations of taxpayer's dealers and route district en.

and assumption of risk was entirely on the part of the taxpayer. Much of that investment, such as high speed presses, typesetting, wirephoto equipment and the like, was obviously designed to facilitate immediate distribution of the news in the form of printed newspapers. To complete the picture, the taxpayer supplied racks where necessary, maintained an office [R. 88, 119], and did the advertising. Phones, when necessary, were listed in the taxpayer's name. [Deft. Ex. B, Sec. 20, par. 2.]

Finally, there was no real opportunity for loss in any real sense since (a) retail and wholesale prices were fixed by the taxpayer so that there would be some net difference as gross earnings [Pltf. Ex. 1, Sec. 1, par. 2; Sec. 3, par. 1], (b) provision was made in the individual employment contracts for crediting unsold copies with the taxpayer's permission [Pltf. Ex. 1, Sec. 1, par. 4], and (c) the taxpayer guaranteed minimum weekly net earnings. [R. 90; Deft. Exs. A, Sec. 26; B, Sec. 25; C, Sec. 22.] The possibility of loss with respect to papers lost, stolen or destroyed was not shown to be significant. Any such voluntary assumed risk in what is customarily a cash transaction can hardly be considered an opportunity for loss, and is entirely in keeping with an employer-employee relationship. The practice of charging out the dealers and route men with their full monthly allotment is a matter of expeditious bookkeeping and cannot be deemed to connote an arm's-length transaction of purchase and sale. For example, it is a generally well-known practice in many restaurants and bars to require the waiters, who are indisputably employees, to pay for the food and drinks and to bear the loss for any failure to collect from the patron.

In addition to all the foregoing and to paying for the phones, supplying the racks and advertising materials, and

ffice space, taxpayer also guaranteed reimbursement for ll authorized and necessary expenses. The fact that the oute men were required to engage carrier boys on their wn behalf, against this background, is entirely eliminated s a factor of any significant weight or importance. In o way were his guaranteed net earnings affected thereby. Vor could his gross earnings be materially affected since ie taxpayer fixed both retail and wholesale prices, and ie dealers or route men, by arranging to charge out their llotment of newspapers, in turn, to the carrier boys, sim-ly accomplished a shifting of charges with the retention f what would amount to virtually the same "profit" argin.

4. Permanency of the Relationship.

Unlike the relationship between independent contractors -expiring at the end of a particular job or result—the axpayer's contract with its dealers and route district men as a continuing one for an indefinite period. A good lea of this can be gotten from the testimony of F. B. 'ahs, a dealer for the taxpayer. His father started with ie Daily News in 1923 and worked for them until his udden death 15 years later. Mr Fahs took over his ather's job and has been with the Daily News ever since. R. 107-108.] Clearly, when the relationship with the axpayer is terminated, these men are out of a job and, ke any employee covered by the Federal Unemployment ax Act, will depend largely upon its benefits to support iemselves and their families while seeking other work. Ve are fortunate, in a very cruel and unfortunate sense, have available in this case stark evidence of the very azards and uncertainties of modern business enterprise gainst whose evil effects the Federal Unemployment Tax

Act throws up its walls. The taxpayer stopped its presses on December 20, 1954. It was declared a bankrupt on or about January 10, 1955. Not only the dealers and route district men here involved, but all its employees lost their jobs. There is no better evidence, we submit, of the dependency and integration of all their jobs than the proceeds of unemployment checks used to provide food, shelter and clothing for themselves and their many dependents. Not having occurred until after the proceedings before the court below, evidence of these facts do not constitute a part of the official record on appeal before this Court. However, the notices, petitions and orders in the bankruptcy proceedings have all been properly filed and certainly constitute facts of which this Court can take judicial notice.

In summary, it seems plain, upon the basis of all the material facts that (1) the District Court erred in that the evidence does not support the ultimate findings of fact; (2) the District Court erred in that the judgment is not supported by any substantial evidence; (3) the District Court erred in finding and concluding that the individuals concerned were independent contractors and not employees of the taxpayer; and (4) the District Court erred in not finding and concluding that the individuals concerned were engaged as a means of livelihood in regularly performing personal services which (i) constituted an integral part of taxpayer's business operation, (ii) were not incidental to the pursuit of a separately established trade or business—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large, and (iii) were subject to a reasonable measure of general control over the manner and means of their performance.

As a question of law, we submit that this case should e controlled in principle, within the general framework stablished by the Supreme Court[11] and Congress,[12] by the ell-reasoned opinion in *Hearst Publications v. United tates,* 70 Fed. Supp. 666 (N. D., Cal.), which this Court ffirmed *per curiam,* 168 F. 2d 751; and by *Gensler-Lee v. Inited States,* 70 Fed. Supp. 675 (N. D., Cal.), and *Tom-n v. United States,* 70 Fed. Supp. 677 (N. D., Cal.), de-ded on the same day.[13] Also see *Grace v. Magruder,* 48 F. 2d 679 (C. A., D. C.); *Schwing v. United States,* 65 F. 2d 518 (C. A. 3d); *Fahs v. Tree-Gold Co-op. Growers of Florida,* 166 F. 2d 40 (C. A. 5th); *Radio City Music Hall Corp. v. United States,* 135 F. 2d 715 (C. A. d); *Capital Life & Health Ins. Co. v. Bowers,* 186 F. 2d 43 (C. A. 4th); *Matcovich v. Anglim,* 134 F. 2d 834 (C. A. 9th), cert. den. 320 U. S. 744. There was before the ourt for consideration in the *Hearst Publications* case the

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[11]*United States v. Silk,* 331 U. S. 704; *Harrison v. Greyvan ines, Inc.,* 331 U. S. 704; *Bartels v. Birmingham,* 332 U. S. 126.

[12]See H. Rep. No. 1319, 80th Cong., 2d Sess.; S. Rep. No. 1255, 0th Cong., 2d Sess.

[13]The *Gensler-Lee* case involved a corporation in the jewelry usiness that engaged a watchmaker in each of its stores to handle atch repairs for its customers. Some were employed on a salary asis and others performed services on a commission basis, the tter being those whose status was in dispute. There was evidence the effect that a lesser degree of control and supervision was xercised over the activities of the watchmakers working on a ommission basis than in the case of salaried watchmakers. The ommission-basis workers provided their own tools and equipment. hey ordered, were billed and paid for the materials used in their ork. In some instances they hired and paid assistants who were nder their sole supervision. Notwithstanding, the commission-asis watchmakers were found by the court to be employees, rely-g upon such facts as that newspaper and radio advertising of atch repairs was done in the taxpayer's name, and that the hours nd minimum compensation of the commission-basis watchmakers ere prescribed by the terms of a contract effective during the

question of the status of the street vendors serving the different newspaper publishers in the Northern District of California. Obviously, almost identical considerations were involved. Subject to a careful study of the applicable case law, with which this Court need not again be burdened in detail at this time, that court stated, *inter alia* (pp. 670-671):

> From these various decisions there evolves at least one principle,—determinative of this cause in favor of the employment status,—entirely reconcilable with established common law doctrines as developed and grown to meet new situations, and with the remedial objectives of social security legislation, and which is, at the same time realistically practical. That is, that any person is an employee within the meaning of social security legislation who is engaged as

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entire taxable period between the watchmakers' union and the taxpayer.

In the *Tomlin* case, the taxpayer, referred to as Rex, was a co-partnership owning coin-operated merchandise vending machines of the crane or claw type. They were placed in various commercial establishments complete with merchandise and equipped to operate at a profit and after 1937 were regularly serviced and periodically emptied of money and redressed by persons engaged as supervisors and operators. It was these men whom Rex disclaimed as its employees. Rex never regulated the hours of work and the supervisors had complete charge of the operative details within their respective territories and engaged the operators themselves in their own behalf. The supervisors retained a portion of the gross profit from the machines as their earnings. They paid to the operators and the location owners a percentage of the profits. The remainder was turned over to Rex. The supervisors were, however, trained by Rex in the business of conducting a route; the manager of Rex made periodical visits to the various territories discussing business and exchanging views; company meetings were called by Rex for these men; the operators were required by Rex to return broken machines to it; routes could only be sold to persons satisfactory to Rex; and Rex retained the right to terminate the relationship at any time. The supervisors and operators were held to be Rex' employees, the exercise of control over the operators being merely a delegated function.

a means of livelihood in regularly performing personal services which (1) constitute an integral part of the business operations of another; (2) are not incidental to the pursuit of a separately established trade, business or profession,—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) are subject to a reasonable measure of general control over the manner and means of their performance.

Even were the facts in the instant case less strong in favor of the Collectors' contentions, we submit that the application of the foregoing principle in the instant case compels the conclusion, as a matter of law, that the individuals concerned were taxpayer's employees.

In the course of its opinion (p. 673), the court recited the following material facts as supporting its conclusion that the news vendors were the publisher's employees:

> The publishers selected the vendors, designated their place, days and hours of service (within the limits agreed on by contracts) and fixed the profits they were to derive from the sale of each newspaper (although the profit, once fixed, remained constant for the period of the existing contract). The vendors were expected to be at their corners at press release time, stay there for the sales period, be able to sell papers and take an interest in selling as many papers as they could. To see that they performed properly, they were kept under the surveillance of the *publisher's employee, the "wholesaler."* * * * The vendor was required to sell his papers complete with sections in the order designated by the publisher and to display only newspapers on the stands or racks, which were furnished by the publishers at the latter's ex-

> pense. The vendor incurred no expense or risks save that of having to pay for papers delivered him which by reason of loss or destruction he was unable to return for credit. The vendors were not allowed to sell competitive newspapers without the publisher's consent. (Italics supplied.)

Apart from the fact that the "wholesaler" is here involved, the circumstances are virtually identical. And this distinction but serves to strengthen the Collectors' case, for, unlike the news vendor, the job of the wholesaler was one that loaned itself to control and such control was exercised. The publisher in the *Hearst* case, to establish the independent contractor relationship, urged (p. 675)—

> the lack of any right in the publishers to dismiss vendors without cause for the duration of the existing contract, the fact that the vendors provided their own transportation, filed no reports, attended no sales meetings, were not required to report to publishers' premises, have employed substitutes, and were privileged to and some actually sold non-competitive publications and other articles without the publishers' consent.

But these were held not to detract from the employer-employee relationship. And what is more, the converse of these facts appears in the instant case and would even more strongly support a similar conclusion. Finally, it would seem that the taxpayer resolved any doubt that may now exist as to the status of its "wholesalers" when it stated in the *Amici Curiae* Brief of Publishers (p. 6), submitted to this Court in the *Hearst Publishing* case, *supra,* by way of description of its over-all operation, that

> *Publishers' employees,* called "wholesalers," were the only persons who had contact with the vendors on

behalf of the publishers. These wholesalers did not control, and did not have the right to control, the vendors in any way. (Italics supplied.)

In light of the foregoing it is evident that the court be- w erred as a matter of law. Further, when Congress larged its list of classes of employees excepted from verage under the Federal Unemployment Tax Act it pressly and carefully limited such exceptions so as to ake it plain that the services here in question were still thin the intended coverage of the Act. H. Rep. No. 20, 80th Cong. 2d Sess. p. 3. The exception (Sec. 1607) (15) (A) and (B) of the Code), as we have earlier ted, reads:

> (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;
>
> (B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers * * *.

is aimed at the vendor boys (like those involved in the *earst Publications* case) only. It was a decision moti- ted by considerations of administrative convenience and licy (H. Rep. No. 1320, *supra,* pp. 2-4; S. Rep. No. 5, 80th Cong., 2d Sess., pp. 1-2) which should be left Congress alone to weigh. See *O'Leary v. Social Secu- y Board,* 153 F. 2d 704, 707 (C. A. 3d). The judicial ecedents which serve as a guide for this Court's deci- n remain untrammelled and all-persuasive.

Conclusion.

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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APPENDIX.

ıternal Revenue Code:

Sec. 1600 [As amended by Sec. 608 of the Social Se-ırity Act Amendments of 1939, c. 666, 53 Stat.. 1360].

ATE OF TAX.

Every employer (as defined in section 1607(a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calendar year with respect to employment (as defined in section 1607(c)) after December 31, 1938.

(26 U. S. C. 1952 ed., Sec. 1600.)

Sec. 1607. Definitions.

When used in this subchapter—

* * * * * * * *

(b) *Wages.*—The term "wages" means all remuneration for employment * * *.

* * * * * * * *

(c) [as amended by Sec. 614 of the Social Security Act Amendments of 1939, *supra*]. *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * * * * *

(15) [as amended by Sec. 2 of the Act of April 20, 1948, c. 222, 62 Stat. 195.] (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

* * * * * * * *

(i) [as amended by Sec. 614 of the Social Security Act Amendments of 1939, *supra,* and Sec. 1 of the Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438.] *Employee.*—The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * * * * *

(26 U. S. C., 1952 ed., Sec. 1607.)

Treasury Regulations 107, promulgated under the Fed-
al Unemployment Tax Act:

SEC. 403.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. * * *

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

* * * * * * * *

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

* * * * * * * *

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act (see section 403.203.)